

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





# 77-6063

## United States Court of Appeals

For the Second Circuit

Docket No. 77-6063

ASSOCIATION OF NATIONAL ADVERTISERS, INC.

*Plaintiff-Appellant,*

*against*

FEDERAL TRADE COMMISSION,

CALVIN J. COLLIER, Chairman, PAUL RAND DIXON and  
ELIZABETH HANFORD DOLE, Commissioners,

*Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

### APPELLANT'S BRIEF

WEIL, GUTTMAN & DAVIS  
*Attorneys for Plaintiff-Appellant*  
60 East 42nd Street  
New York, New York 10017  
(212) 687-8573

GILBERT H. WEIL,  
ROBERT L. SHERMAN  
*of Counsel*



## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <u>Page</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Table of Cases                                                                                                                                                                                                                                                                                                                                                                                                                                                    | i           |
| Issues Presented for Review                                                                                                                                                                                                                                                                                                                                                                                                                                       | 1           |
| Statement of Facts                                                                                                                                                                                                                                                                                                                                                                                                                                                | 2           |
| A. The Trade Regulation<br>Rulemaking Proceeding                                                                                                                                                                                                                                                                                                                                                                                                                  | 2           |
| B. Proceedings before the<br>District Court                                                                                                                                                                                                                                                                                                                                                                                                                       | 8           |
| The Significance of the District Court's<br>Decision, and the Resultant and Continuing<br>Irreparable Injury to ANA.                                                                                                                                                                                                                                                                                                                                              | 9           |
| Argument                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 12          |
| Précis                                                                                                                                                                                                                                                                                                                                                                                                                                                            | 12          |
| A. ANA Has Been Injured in Its<br>Rights of Cross-Examination<br>and Rebuttal.                                                                                                                                                                                                                                                                                                                                                                                    | 12          |
| B. ANA, by Having Been Compelled<br>to Choose Between Risking Loss<br>of Its Right to Cross-Examine<br>and Rebut Whatever Relevant Matter<br>Might Lurk in the 25,000 Pages of<br>Matter Involved Herein by Not Under-<br>Taking to Study Them, or, on the<br>Other Hand, to Moot Its Case and<br>Sacrifice All Judicial Review of<br>the Commission's Action Complained<br>of Herein, Has Been Irreparably<br>Injured Unless It Can Have<br>Judicial Review Now. | 17          |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| C. The District Court Had Jurisdiction and Should Have Exercised Immediate Review.                                                                                                                                                                                                                                                                                                                                                                                                         | 20 |
| 1. 15 U.S.C. §57a(e) Neither Gives the Court of Appeals Exclusive Jurisdiction Over Review of FTC Actions with Respect to TRR Proceedings Other than the Final Rule Itself, Nor Otherwise Precludes District Courts from Reviewing FTC Actions Concerning TRR Proceedings Other than Such Final Orders Themselves. Therefore, Section 57a (e) does not Bar District Court Jurisdiction to Hear ANA's Complaint Herein of the Commission's Actions Other than Promulgation of a Final Rule. | 22 |
| 2. The Doctrine of <u>Myers</u> is Not Only Inapplicable to TRR Proceedings but Inimical to Their Underlying Legislative Purpose.                                                                                                                                                                                                                                                                                                                                                          | 23 |
| 3. Basic Principles of Non-Statutory Law, Stemming from <u>Leedom v. Kyne</u> and <u>Fay v. Douds</u> Establish the District Court's Jurisdiction Over the Within Case.                                                                                                                                                                                                                                                                                                                    | 25 |
| 4. Since, As Has Been Shown at Pages 17-20 Above, Deferred Judicial Review Could No Longer Give ANA Adequate Relief From the Injury It Now Faces, It is Entitled to Receive Such Relief in This Case Under 5 U.S.C. § 704.                                                                                                                                                                                                                                                                 | 34 |
| 5. ANA Has Exhausted All Administrative Remedies Available To It; The Commission's Actions Are Ripe For Judicial Review.                                                                                                                                                                                                                                                                                                                                                                   | 40 |
| Summary                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 42 |
| Conclusion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 43 |

# TABLE OF CASES

|                                                                                                                                |                                 |
|--------------------------------------------------------------------------------------------------------------------------------|---------------------------------|
| <u>Abbott Laboratories v. Gardner</u> , 387 U.S.<br>136 (1967) . . . . .                                                       | .30, 34, 35, 36, 39, 42         |
| <u>B.F. Goodrich Co. v. FTC</u> , 208 F.2d 829<br>(D.C. Cir. 1953), <u>appeal after remand</u><br>242 F.2d 31 (1957) . . . . . | .31                             |
| <u>Bigelow v. Virginia</u> , 421 U.S. 809 (1975) . . . . .                                                                     | .29                             |
| <u>Blount v. Rizzi</u> , 400 U.S. 410 (1971). . . . .                                                                          | .29                             |
| <u>Boire v. Greyhound Corp.</u> , 376 U.S. 473 (1964) . . . . .                                                                | .30                             |
| <u>Elmo Division of Drive-X Co., Inc. v. Dixon</u> ,<br><u>FTC</u> , 348 F.2d 342 (D.C. Cir. 1965) . . . . .                   | .35                             |
| <u>Farmer v. United Electrical, Radio Machine<br/>Workers of America (UE)</u> ,<br>211 F.2d 36 (D.C. Cir. 1953) . . . . .      | .33                             |
| <u>Fay v. Douds</u> , 172 F.2d 720 (2nd Cir. 1949). . . . .                                                                    | .27, 30, 42                     |
| <u>Gardner v. Toilet Goods Association</u> , 387 U.S. 167<br>(1967) . . . . .                                                  | .34, 35                         |
| <u>Jewel Companies Inc. v. FTC</u> , 432 F.2d 1155<br>(7th Cir. 1970) . . . . .                                                | .32, 33                         |
| <u>Leedom v. Kyne</u> , 358 U.S. 184 (1958) .25, 26, 27, 28, 30, 39, 42                                                        |                                 |
| <u>Linmark Associates, Inc. v. Willingboro</u> ,<br>No. 76-357, U.S. Supreme Court,<br>May 2, 1977. . . . .                    | .29                             |
| <u>Maremont Corp. v. FTC</u> , 431 F.2d 124<br>(7th Cir. 1970). . . . .                                                        | .21                             |
| <u>McKart v. United States</u> , 395 U.S. 185 (1967). . . . .                                                                  | .31                             |
| <u>Miami Newspaper Printing Pressman's<br/>Union Local v. McCulloch</u> , 322 F.2d 993<br>(D.C. Cir. 1963) . . . . .           | .27, 33                         |
| <u>Myers v. Bethlehem Shipbuilding Corp.</u> , 303 U.S. 41<br>(1938) . . . . .                                                 | .10, 11, 19, 21, 23, 39, 41, 42 |
| <u>Sterling Drug, Inc. v. Weinberger</u> , 509 F.2d 1236<br>(2nd Cir. 1975). . . . .                                           | .21, 30, 41                     |



|                                                                                                                            |                        |
|----------------------------------------------------------------------------------------------------------------------------|------------------------|
| <u>PepsiCo., Inc. v. FTC</u> , 472 F.2d 179<br>(2nd Cir. 1972) . . . . .                                                   | 21, 25, 38, 39, 41, 42 |
| <u>The Coca-Cola Company v. FTC</u> , 475 F.2d 299<br>(5th Cir. 1973) . . . . .                                            | 21, 27, 36, 41, 42     |
| <u>The Seven-Up Company v. FTC</u> , 478 F.2d 755<br>(7th Cir. 1973) . . . . .                                             | 27                     |
| <u>Toilet Goods Association v. Gardner</u> , 387 U.S. 158<br>(1967). . . . .                                               | 34, 35                 |
| <u>Union Bag-Camp Paper Corporation v. FTC</u> ,<br>233 F. Supp. 660 (S.D.N.Y. 1964). . . . .                              | 33                     |
| <u>Virginia State Board of Pharmacy v. Virginia<br/>Citizens Consumer Council, Inc.</u> ,<br>425 U.S. 748 (1976) . . . . . | 29                     |

#### STATUTES

|                                                |                                |
|------------------------------------------------|--------------------------------|
| 5 U.S.C. §551 (13) . . . . .                   | 37                             |
| 5 U.S.C. §702. . . . .                         | 36                             |
| 5 U.S.C. §704. . . . .                         | 11, 20, 21, 23, 25, 36, 37, 39 |
| 15 U.S.C. §57a . . . . .                       | 2, 24                          |
| 15 U.S.C. §57a (a)(1)(B) . . . . .             | 2                              |
| 15 U.S.C. §57a (b)-(d) . . . . .               | 2, 14, 33                      |
| 15 U.S.C. §57a (b)(2). . . . .                 | 2                              |
| 15 U.S.C. §57a (c) . . . . .                   | 22                             |
| 15 U.S.C. §57a (c)(1). . . . .                 | 2                              |
| 15 U.S.C. §57a (c)(1)(A) . . . . .             | 4, 22                          |
| 15 U.S.C. §57a (c)(1)(B) . . . . .             | 4, 13, 14                      |
| 15 U.S.C. §57a (c)(3)(B) . . . . .             | 18                             |
| 15 U.S.C. §57a (e)(1)(A), (B) and (C). . . . . | 20, 21, 22, 36                 |

|                                    |    |
|------------------------------------|----|
| 15 U.S.C. §57a (e)(3)(A) . . . . . | 14 |
| 15 U.S.C. §57a(e)(5)(A). . . . .   | 23 |
| 15 U.S.C. §57a(e)(5)(B). . . . .   | 22 |

#### RULES AND REGULATIONS

|                                  |        |
|----------------------------------|--------|
| 16 CFR §§1.12. . . . .           | 3, 4   |
| 16 CFR §1.13 (b) . . . . .       | .3     |
| 16 CFR §1.13 (c)(1)(i) . . . . . | 3, 4   |
| 16 CFR §1.13 (c)(1)(v) . . . . . | .3     |
| 16 CFR §1.13(c)(1)(vi) . . . . . | 16     |
| 16 CFR §1.13 (c)(2)(i) . . . . . | .8, 18 |
| 16 CFR §1.13 (d)(3). . . . .     | .3     |
| 16 CFR §1.13 (d) (5)(i). . . . . | 13     |
| 16 CFR §1.13(d)(5)(iii). . . . . | 18     |
| 16 CFR §1.18 (b) . . . . .       | .6     |
| 16 CFR §3.43(b). . . . .         | 24     |
| 16 CFR §4.9. . . . .             | 14     |

#### OTHER AUTHORITIES

|                                                                    |    |
|--------------------------------------------------------------------|----|
| <u>Cong. Rec.</u> , H12349 (daily ed., Dec. 19, 1974). . . . .     | 16 |
| 40 <u>Fed. Reg.</u> 23086, <u>et seq.</u> (May 28, 1975) . . . . . | .2 |
| 41 <u>Fed. Reg.</u> 8980, <u>et seq.</u> (March 2, 1976) . . . . . | .3 |
| 1974 U.S. Code Cong. & Administrative News 7755, 7766. . . . .     | 22 |



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
ASSOCIATION OF NATIONAL  
ADVERTISERS, INC.,

Plaintiff-Appellant,

- against -

Do. et No.  
77 53

FEDERAL TRADE COMMISSION, CALVIN  
J. COLLIER, Chairman, PAUL RAND  
DIXON and ELIZABETH HANFORD DOLE,  
Commissioners,

Defendants-Appellees.  
-----x

BRIEF FOR PLAINTIFF-APPELLANT

Appellant, Association of National Advertisers,  
Inc. ("ANA"), appeals from the order entered February 14,  
1977 upon the opinion of Honorable John M. Cannella,  
U.S.D.J., denying plaintiff's motion for preliminary  
injunctive relief and granting defendants' motion to  
dismiss the complaint pursuant to F.R.C.P. Rule 12(b),  
and from the judgment entered thereon on February 17,  
1977.

Issues Presented for Review

1. Did the district court err in refusing to  
grant ANA the preliminary relief it sought despite the  
fact that ANA had shown that it would be irreparably harmed  
if such relief were denied?



2. Did the district court err in dismissing the complaint on the ground that the court lacked jurisdiction on the ground that the Federal Trade Commission's ("FTC" or "the commission") refusal to excise massive, irrelevant portions of the record in a trade regulation rulemaking proceeding (15 U.S.C. §57a) is not final agency action for which there is no other adequate remedy in a court?

3. Did the district court err in dismissing the complaint notwithstanding that ANA and other "interested persons" [15 U.S.C. §57a (b)(2) and (c)(1)] would be irreparably injured through deprivation of their statutory right to participate meaningfully in trade regulation rulemaking proceedings (in which ANA is an interested person) by FTC's refusal to excise massive, irrelevant documents from the record thereof?

#### Statement of Facts

##### A. The Trade Regulation Rulemaking Proceeding

By publication of a notice in the Federal Register of May 28, 1975, at pages 23086, et seq, the commission initiated a rulemaking proceeding ("the proceeding") under 15 U.S.C. §57a (a)(1)(B) and 57a (b)-(d) to promulgate a trade regulation rule ("TRR") to govern various practices in the advertising of food products [Complaint, ¶ FOURTH; 6a].

National sales of food products by manufacturers and processors are in excess of one hundred billion dollars per year, and the advertising of such products that would be affected by the commission's proposed TRR exceeds \$2.5 billion [Complaint, ¶ FIFTH; 7a].

Because leading and major food advertisers form an important segment of ANA's membership, it filed a notification of interest in the proceeding pursuant to 16 CFR §1.13 (d)(3), as well as written comments proposing issues for consideration pursuant to 16 CFR §1.13 (b); and the Presiding Officer for the proceeding designated ANA one of the group representatives under 16 CFR §1.13 (c)(1)(v) [Complaint, ¶ SIXTH; 7a].

Under date of March 2, 1976, the Presiding Officer issued a Final Notice Regarding Proposed Trade Regulation Rule, 41 Fed. Reg. 8980, et seq., pursuant to 16 CFR §§1.12 and 1.13 (c)(1)(i), in which, among other things, he:

- a) divided the proceeding into three separate "phases";
- b) ruled that, for the present, hearings were to take place on only the first of said three phases;
- c) limited the subject matter of the said first phase to only certain



specified sections and subsections of the proposed TRR, explicitly relegating the rest to a designated one of the remaining and deferred phases; and

- d) further delimited the scope of hearings within the first phase by particularizing, under 16 CFR §§ 1.12 and 1.13 (c)(1)(i), the specific issues to be considered therein [Complaint, ¶ SEVENTH; 7a-8a].

Presumably, the Presiding Officer's action was taken to save the time, effort and expense of all interested persons 1/ by allowing them to conserve their efforts and confine their attention to only the matters and occasions as to which they felt a concern.

Prior to the issuance of the Presiding Officer's Final Notice of March 2, 1976, more than 15,000 pages of documents had been introduced into the rulemaking record of the proceeding, the vast bulk of which did not relate to the first phase of the hearings or to its designated issues. Large quantities of the submissions were not even relevant

---

1/ 15 U.S.C. §57a (c)(1)(A) guarantees the right of any "interested person" to present his position orally or by documentary submissions (or both).... during a rule-making hearing, and section 57a (c)(1)(B) provides such persons the rights of cross-examination and rebuttal as to all disputed issues of material fact.

to any part of the proposed TRR. Anything and everything anyone sent in was allowed automatically and indiscriminately to load the rulemaking record.

ANA, concerned over the excessive and unwarranted expense, time and effort that would have to be consumed to search through that entire mass of paper (which it would have to do lest it be exposed to the risk of overlooking some needle of relevancy in the haystack of impertinence that could be relevant to the limited scope of subject matter designated for the first phase), filed a petition with the Presiding Officer, a true copy of which is attached to the complaint as Item 4 (69a-71a), to separate so much of that rulemaking record as was germane to the first phase from the rest -- the great bulk -- that had nothing to do with it. The petition was denied in a ruling by the Presiding Officer, dated April 22, 1976, a true copy of which is attached to the complaint as Item 4A (72a-74a) [Complaint, ¶ EIGHTH; 8a].

Despite the express direction of the commission as set forth in section 8.7 of the Commission's Operating Manual -

The Commission has directed that, absent special circumstances warranting a different course, evidentiary material considered in connection with the formulation of proposed Trade Regulation Rules should be placed upon the public record in order to insure the fullest and most meaningful participation in the rule-making proceeding by interested members of the public and those most likely to be affected by the rule (emphasis added) -



the commission's staff, on or about April 28-30, 1976, put into the rulemaking record 2/ of the proceeding, for the first time, with full knowledge of the limited scope of its first phase, approximately 25,000 pages of documents, vast amounts, if not most, of which are irrelevant to the first phase and its issues, and substantial numbers of which are not germane even to any part of the proposed TRR [Complaint, ¶ NINTH; 8a-9a].

Although theoretically the said documents were put into the first phase rulemaking record as of April 28-30, 1976, copies of them were not made available to ANA until on or about June 16, 1976, despite the requirements of 16 CFR §1.18 (b) as to public availability thereof. Somewhere between their docketing and their public surfacing, they disappeared into the bowels of bureaucratic processes where interested persons could not reach them.

Inasmuch as the first hearing in the first phase was scheduled to commence on July 12, 1976, ANA had filed a petition on or about June 11, 1976 with the Presiding Officer to postpone the hearings for a time adequate for it to prepare for them based upon such documents which, at that time, it had not even received. A true copy of said petition is attached to the complaint as Item 6 (79a-88a). On or about June 16, 1976 the Presiding Officer denied the petition

---

2/ The significance of the difference between the commission's public record and a rulemaking record will be shown below at page 14, note 5.

in a ruling of which a true copy is attached to the complaint as Item 7 (89a-91a) [Complaint, ¶ TENTH; 9a].

After ANA received copies of the documents referred to above, and had a short time to start examining them, it discovered that they vastly exceeded the prescribed bounds of the first phase. On or about June 25, 1976, therefore, it filed with the Presiding Officer a petition, a true copy of which is attached to the complaint as Item 8 (92a-106(11)a), which, among other things:

- a) set forth the impropriety of the staff's actions and the prejudice to ANA therefrom;
- b) requested by way of remedy that the staff's belated and massive submission be expunged from the rulemaking record of the first phase, to be restored only to the extent that a showing might be made of reasonable relevance thereto;
- c) requested that all future submissions be placed in the rulemaking record only upon a showing of reasonable relevance to the first phase;
- d) requested, because of the shortness of time, that if the Presiding Officer ruled adversely to ANA's petition he simultaneously certify his ruling for



immediate review by the commission in accordance with 16 CFR §1.13 (c)(2)(i), that being the only way open to ANA for interlocutory appeal to the commission; and

- e) requested, because of the shortness of time, that the Presiding Officer stay, or postpone, the hearings until after ANA's petition had been finally ruled upon, lest ANA be deprived of an adequate remedy [Complaint, ¶ ELEVENTH; 10a-11a].

Under date of July 1, 1976 the Presiding Officer denied ANA's petition. A true copy of that ruling is attached to the complaint as Item 9 (107a-109a) [Complaint, ¶ TWELFTH; 11a].

#### B. Proceedings before the District Court

ANA's complaint was filed on July 23, 1976 seeking (1) a temporary order staying all hearings by the commission in the rulemaking proceeding until the within action had been finally determined and (2) a final order requiring the commission to expunge from the rulemaking record all matters which its staff had entered therein on or about April 28-30, 1976, without prejudice to re-entering into the said rulemaking record such matters as might first be shown to bear a reasonable relevance to one or more of the issues designated for hearing therein pursuant to the commission's applicable rules and regulations.

On approximately September 8, 1976 defendants filed their motion to dismiss the complaint pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure. ANA's memorandum in opposition to the motion to dismiss was filed on September 22, 1976. Defendants' reply memorandum was filed on October 6, 1976. ANA's sur-reply memorandum was filed on October 12, 1976.

The Honorable John M. Cannella, U.S.D.J., issued a memorandum decision dated February 11, 1977, upon which an order was entered on February 14, 1977, denying ANA's motion for preliminary injunctive relief and granting defendants' motion to dismiss the complaint. A judgment was entered on February 17, 1977.

On March 31, 1977 ANA filed its Notice of Appeal from that portion of the order dismissing its complaint. On April 5, 1977 it amended its Notice of Appeal so as to encompass each and every part of said order. ANA filed its Second Amended Notice of Appeal on April 12, 1977, having discovered on that date that a judgment had been entered on February 17, 1977, of which it had not received notice.

THE SIGNIFICANCE OF THE DISTRICT COURT'S  
DECISION, AND THE RESULTANT AND CONTINUING  
IRREPARABLE INJURY TO ANA.

To avoid any misunderstanding, we point out that:

- ANA is not seeking review or prevention of a finally promulgated trade regulation rule.



- ANA is not seeking review of the propriety of any specified quantity, including an unlimited quantity, of relevant documents being placed on the rulemaking record, or of any member of the public's right to participate in the proceeding by making relevant written or oral submissions.

What ANA does seek review of is the impropriety of the commission's allowing the rulemaking record to be swamped with approximately 25,000 pages of documents without regard to their relevancy or irrelevancy to those disputed issues of fact that have been specified as material to the proceeding. By permitting the record to be flooded with such documents the commission places ANA and all other "interested persons" between the horns of a dilemma.

ANA has already determined that, based upon a reasonable sampling, the overwhelming majority, if not virtually all, of the subject documents can be expected to be irrelevant to the first phase of the proceeding and the issues encompassed thereby. (See Weitzman affidavits, attached to the complaint as Item 5 and attachment 4 to Item 8; 75a-78a, 106(1)a-106(11)a.) Accordingly, it would require an inordinate and wasteful expenditure of time, money and effort for ANA to attempt to negotiate the paper mountain that the commission has erected in its path. Wasteful because the major part of it, by far, would go to documents that have no proper place in the proceeding to start with. 3/ ANA's resources are finite,

---

3/ Inappropriateness of the doctrine of Myers v. Bethlehem Shipbuilding Corp. to TRR proceedings will be dealt with at pages 23-25 below.

and at some point the burden upon them of coping with an overload of irrelevant materials must break their back and bring to a halt its "fullest and most meaningful participation" in the proceeding (Commission's Operating Manual §8.7, supra, p. 5). For numbers of other "interested persons" who are entitled to and desire to participate in the proceeding, their still more limited funds must bring them even sooner to the point where they cannot afford to do so.

Further, if, to be safe, ANA were to proceed to review and analyze each of the thousands of document pages thrown into the rulemaking record, it will, in addition to draining its resources, do so only to moot its appeal to a court and lose all chance of an "adequate remedy in a court" 5 U.S.C. §704. Having reviewed the documents, no court could any longer relieve ANA of the unjust and wrongfully imposed burden of doing so.

Permitting the commission's wrong to go unrighted while it is still possible to remedy it would set a precedent that utterly frustrates a primary purpose of the Act, which is to allow for public participation in rulemaking proceedings by those most interested in the outcome thereof and who stand to be most affected by a final rule. Although the mere expense of defending litigation, standing alone, may be insufficient to sustain an allegation of irreparable injury, Myers, supra note 3, that doctrine is out of place in the context of an FTC rulemaking proceeding where a major objection is



to facilitate participation of the "fullest" and "most meaningful" sort from all levels of the potentially affected public. The distinction will be more fully discussed at pages 23-25 below.

## ARGUMENT

### Precis

ANA will present the following arguments:

A. ANA has suffered injury as a result of the commission's final action complained of.

B. Such injury is irreparable and without adequate legal remedy other than through the within case, and justifies immediate judicial relief.

C. ANA exhausted its administrative remedies before the FTC from the latter's final action; the action below was not premature and has an adequate jurisdictional basis.

#### A. ANA HAS BEEN INJURED IN ITS RIGHTS OF CROSS-EXAMINATION AND REBUTTAL.

The Federal Trade Commission Act §57a guarantees ANA, and all other interested persons in the public, of whatever kind or station, whether industrial or consumer, the right to participate meaningfully in a TRR proceeding. The commission's final action complained of herein severely prejudices ANA's said right, and, as a precedent, would generate a modus operandi that will do so in future proceedings with respect to ANA and any other interested persons who may be similarly affected by it.

The FTC Act ("the Act", or "FTCA") now provides for procedures applicable to FTC rulemaking proceedings. It also establishes certain legislatively mandated guarantees that must be provided to all interested persons who wish to participate in those proceedings.

15 U.S.C. §57a (c)(1)(B) [see also 16 CFR §1.13 (d) (5)(i)] sets forth that

An interested person is entitled to present such rebuttal submissions and to conduct...such cross-examination as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to [material] issues.

A Presiding Officer, appointed by the commission and charged with responsibility for the orderly conduct of the rulemaking proceeding, must see to it that such rights are protected. 4/

The Act requires the rulemaking procedures to be so structured as to minimize burdens and expenses and hence maximize the feasibility and meaningfulness of the rights of cross-examination and rebuttal.

When prescribing a rule, the commission must

(1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to

---

4/ "The Presiding Officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the issues designated for consideration..." 16 CFR §1.13 (d) (5)(i) (emphasis added). It would seem that if cross-examination and rebuttal must be limited to what is relevant, so too, must be the evidence (including written submissions) to which those processes are to be applied.



submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B) of this section), together with a statement of basis and purpose.

15 U.S.C. §57a (b),  
in pertinent part.

Thus, implicitly, if not explicitly, the commission and its appointed representative are required to make a specific proposal, determine whether there exist disputed issues of material fact (material to such proposal) necessary to be resolved, and conduct hearings in furtherance thereof. Everything points to a legislative intent that the hearings focus upon specified and material issues; not that the "rulemaking record" upon which the "final rule" is to be "based" be submerged in "matter" that is irrelevant and immaterial. 5/

Likewise, the guarantee in section 57a (c)(1)(B) of an interested person's right to cross-examine and rebut with respect to "disputed issues of material fact" (supra,

---

5/ There is a critical distinction, in this respect, between the commission's public records (16 CFR §4.9) and a TRR rulemaking record. Judicial review of a finally promulgated TRR is made upon, and confined to, its rulemaking record, not upon anything that appears anywhere in an FTC public record, 15 U.S.C. §57a (e)(3)(A). Thus, relevance is important for admissibility of evidence into a rulemaking record, but not for a public record. Cf. section 8.7 of the Commission's Operating Manual, supra, p. 5. If the documents involved in this case had been placed in the commission's public records rather than received into the rulemaking record there would have been no problem.

p. 13) means nothing unless the person can first identify what there is in the rulemaking record that should be subjected to his cross-examination 6/ and rebuttal. Even sifting through a voluminous record of relevant evidence is unfortunate enough an impediment to that. But allowing the base of relevant "matter" to be buried in a din of extraneous noise does more than mock the legislative purpose; it would put an effective tool in the hands of anyone who would frustrate cross-examination and rebuttal of whatever grain of wheat he might seek to sneak into the rulemaking record concealed in a ton of chaff.

---

6/ Where such matter is written in the first instance, there is a right to have the author produced for cross-examination.

Mr. ECKHARDT. There is a provision on page 33 of the report which states that --

If the Commission determines (1) that there are disputed issues of material fact, and (2) that it is necessary to resolve such issues, interested persons would be entitled to present such rebuttal submissions and to conduct (or have conducted by the Commission) such cross-examination of persons commenting orally as the Commission determines to be appropriate and required for a full and true disclosure with respect to such issues. The only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact.

I point out the word "orally," and I wish to find out if the gentleman from California (Mr. Moss) feels that that language is exclusive, or merely descriptive of the section dealing with oral presentation.

(Footnote cont'd.)



Thus, actions taken by the commission, and which are now final, have violated ANA's and other members of the the public's rights to the fullest and most meaningful cross-examination, rebuttal and administrative proceeding of minimized burden.

The injury is aggravated for ANA, as it has been designated a group representative by the Presiding Officer

---

(Footnote cont'd.)

Mr. MOSS. It is the intent and the understanding of the gentleman from California that the words "commenting orally" were intended to be descriptive, and not limiting. In other words, the Commission could authorize cross-examination of written submissions if it determined that it was appropriate.

Mr. ECKHARDT. For instance, if the Commission should rely, in making a rule on a written report of one of its agents and cross-examination of that agent is necessary for fair determination of the rulemaking procedure taken as a whole, the Commission should make that agent available for cross-examination. Am I correct in that?

Mr. MOSS. The gentleman is indeed correct.

Cong. Rec., H12349  
(daily ed., Dec. 19, 1974)

See, also 16 CFR §1.13(c)(1)(vi), empowering Presiding Officers to "compel the attendance of persons".

for purposes of cross-examination and rebuttal (Hafner, ¶9 (112a); Complaint, ¶ SIXTH; 7a). 7/ As such it represents a group of persons which expend annually many millions of dollars for the advertising of food products. It has been entrusted to conduct meaningful cross-examination and rebuttal for them during the proceeding in a manner that will best protect their interests in the outcome. The commission's actions seriously impede ANA's ability, and therefore its right, to effectively cross-examine and rebut not only in its own behalf but, as well, for those whom it represents.

B. ANA, BY HAVING BEEN COMPELLED TO CHOOSE BETWEEN RISKING LOSS OF ITS RIGHT TO CROSS-EXAMINE AND REBUT WHATEVER RELEVANT MATTER MIGHT LURK IN THE 25,000 PAGES OF MATTER INVOLVED HEREIN BY NOT UNDERTAKING TO STUDY THEM, OR, ON THE OTHER HAND, TO MOOT ITS CASE AND SACRIFICE ALL JUDICIAL REVIEW OF THE COMMISSION'S ACTION COM-PLAINED OF HEREIN, HAS BEEN IRREPARABLY INJURED UNLESS IT CAN HAVE JUDICIAL REVIEW NOW.

On April 28-30, 1976 the commission's staff unloaded approximately 25,000 pages into the rulemaking record, copies of which ANA was unable to obtain until June 16, 1976. As it turns out, most, if not all of them, had been in the staff's possession or control long prior to that date (Hafner, ¶14; 114a).

---

7/ The legislators considered the rights of cross-examination and rebuttal so fundamental that the inability of a group of persons with the same or similar interests to agree upon its representative will not deprive a person of the opportunity to conduct his own cross-examination where his particular interest is involved:

(Footnote cont'd.)



After having unsuccessfully petitioned the Presiding Officer to postpone the hearings until it would have had an adequate opportunity to study the approximately 25,000 pages in preparation for said hearings, ANA then petitioned him, based on its determination of the probability of a high level of irrelevancy, 8/ to expunge those 25,000 pages in their entirety from the record of phase one, but without prejudice to the commission's staff's reoffering them into the record contingent upon a reasonable showing of their relevance to the first phase of the hearings. Under date of July 1, 1976 the Presiding Officer denied that petition.

All rulings of the Presiding Officer that have been referred to above are, under 16 CFR §1.13 (c)(2)(i), final decisions on behalf of the commission, as they are not subject to review by it until it finally reviews the entire proceeding. By that time ANA will no longer have

---

(Footnote cont'd.)

... such person shall not be denied ... the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if ... he has made a reasonable and good faith effort to reach agreement upon group representation with other members of the group ... and ... there are substantial and relevant issues which are not adequately presented by the group representative, 15 U.S.C. §57a (c)(3)(B); see also, 16 CFR §1.13(d)(5)(iii).

8/ See description of typical examples of such irrelevant documents in Weitzman affidavit (Attachment 4 to Item 8; 106(1)a-106(11)a) and note a description of the reasonable sampling methods by which examples such as these were discovered (¶¶8-10, Item 5; 78a).

any adequate remedy for the wrongs it seeks to be righted.

The result of deluging the record of the hearings with massive irrelevancies is, whether deliberate or not, to obstruct meaningful participation by interested parties to a point of impossibility for most and of extreme difficulty and constriction for the rest. If, in order to cross-examine or rebut with respect to one or more specific issues, an interested person must wade through thousands upon thousands of pages of documents that have nothing to do with the hearing in order to deal with those that might be relevant to a properly identified issue, the consumption of resources of every kind necessary in that treasure hunt will make supposed public involvement in rulemaking proceedings a cynical pretense.

In brief, to review and analyze the thousands of documents in issue in order to prepare for cross-examination and rebuttal, would require many times the time, work and expense 9/ that would otherwise be necessary if those documents first satisfied a relevancy requirement. Beyond, and perhaps even worse than that, once an interested person has actually completed a review of the documents he will have mooted the question he might otherwise have ultimately presented for judicial review, thus being forced to abandon his legal rights. The relief he might have looked forward to, of not having to go through that drain - perhaps prohibitive - upon his resources, will no longer have any meaning for him or present any controversy for a court to decide.

---

9/ Inappropriateness of the Myers v. Bethlehem doctrine regarding expense of defending litigation will be discussed at pages 23-25 below.



Alternatively, however, to forego cross-examination and rebuttal on any possible portion of those thousands of documents that might happen to be relevant would subject ANA to equal or even greater injury, for then it might be confronted with a rule based on matter in the rulemaking record which it did not attempt to discredit.

No subsequent legal remedy can possibly be adequate to relieve ANA of the injury it suffers from being on the horns of that dilemma right now. It would come too late.

If ANA fails, prior to the Presiding Officer's report, the commission's staff's submission, submissions by other members of the public and the promulgation of the final rule itself, to review and analyze the documents in issue, it is exposed to the risk of having the content of some of those documents used against it in the passage of a rule, without having prepared for that contingency. Any subsequent review of the rule itself will not provide protection of ANA's earlier, but then lost, right of meaningful participation through meaningful cross-examination and rebuttal.

C. THE DISTRICT COURT HAD JURISDICTION  
AND SHOULD HAVE EXERCISED IMMEDIATE  
REVIEW.

The government contention has been, and presumably will continue to be, that judicial review of the wrongs complained of herein is vested exclusively in a court of appeals on appeal from a final TRR, under 15 U.S.C. §57a (e)(1)(A), (B) and (C); as well as by the second sentence of 5 U.S.C. §704;

and by the doctrine of Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) - carried forward by such decisions as The Coca-Cola Company v. FTC, 475 F.2d 299 (5th Cir. 1973); PepsiCo., Inc. v. FTC, 472 F.2d 179 (2nd Cir. 1972); Maremont Corp. v. FTC, 431 F.2d 124 (7th Cir. 1970) and Sterling Drug, Inc. v. Weinberger, 509 F.2d 1236 (2nd Cir. 1975) that the burden of expense in having to go through the entire administrative process up to its final order (here, rule) is not, standing alone, such irreparable injury as would justify intermediate judicial interest.

We shall show, therefore:

- (1) That far from preempting ANA's cause of action, section 57a(e) does not even confer original jurisdiction in the court of appeals over the claim that is presented by the complaint herein;
- (2) That the Myers doctrine is inappropriate where a TRR proceeding is concerned;
- (3) That the applicable and governing precedents of non-statutory law dictate immediate judicial review in circumstances of the nature presented here;
- (4) That not only does 5 U.S.C. §704 not preclude immediate district court review here; to the contrary, its first sentence requires it; and



(5) ANA has exhausted its avenues for administrative relief with respect to the wrongs and injuries complained of herein.

1. 15 U.S.C. §57a(e) Neither Gives the Court of Appeals Exclusive Jurisdiction Over Review of FTC Actions with Respect to TRR Proceedings Other than the Final Rule Itself, Nor Otherwise Precludes District Courts from Reviewing FTC Actions Concerning TRR Proceedings Other than Such Final Orders Themselves. Therefore, Section 57a (e) does not Bar District Court Jurisdiction to Hear ANA's Complaint Herein of the Commission's Actions Other than Promulgation of a Final Rule.

---

To support its contentions the commission has quoted various provisions of 15 U.S.C. §57a (e) and of the legislative history accompanying its enactment. The citations relied on only betray its position.

In each instance, the subsection relied on by the commission refers to review of a "rule" [15 U.S.C. §57a(c) (1)(A); 15 U.S.C. §57a(e)(5)(B) or to "final rules" (1974 U.S. Code Cong. & Administrative News 7755, 7766). By its own terms the judicial review section of the Act, which does include the jurisdiction and venue provisions for courts of appeals, applies only to finally promulgated trade regulation rules. That, with the exception of subsection (e)(5)(C), 10/ it relates only to review of final rules is made clear

---

10/ Section 57a(e)(5)(C), which does deal explicitly with cross-examination and rebuttal, imposes appellate exclusivity only where the allegedly improper curtailment arises out of a "determination, rule, or ruling of the Commission described in paragraph (3)(B)(i) or (ii)". Those paragraphs refer, in turn only to Commission actions pursuant to "a Commission determination, ... or rule or ruling under subsection (c) of this section",

(Footnote cont'd.)

if not emphasized, by 15 U.S.C. §57a(e)(5)(A) which provides that "[r]emedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law." That, then, leaves the issue to the principles and authorities that will be described in the following sections.

2. The Doctrine of *Myers* is Not Only Inapplicable to TRR Proceedings but Inimical to Their Underlying Legislative Purpose.

The *Myers* principle (that having to sustain the expense of defending against a full adjudicative type administrative proceeding before qualifying for judicial review of agency action involved in it is not the kind of irreparable injury that justifies earlier recourse to the courts) has not, to our knowledge, yet received critical judicial consideration of its appropriateness, vel non, to a TRR proceeding.

We submit it is inapplicable at least in the present case, for three reasons.

To start with, it was plainly the intent of the congress, and has - except here - been a goal of the commission -

---

(Footnote cont'd.)

either that "the petitioner is not entitled to conduct cross-examination or make rebuttal submissions" or "limiting the petitioner's cross-examination or rebuttal submissions" (emphasis ours).

Indeed, appellate jurisdiction over the matter involved in this case is not even conferred upon courts of appeals by section 57a(e), which speaks only to reviewing the final rule itself, together with the subsection (c) actions above-described. Only 5 U.S.C. §704--which, as we shall point out below, is not an exclusionary mandate--would vest a court with reviewing authority over such issues as are raised herein.



that "the fullest and most meaningful participation" of any and all interested persons in the public be made possible; be encouraged and facilitated, not obstructed and burdened. Supra, pages 5 and 12-17. Imposition of unnecessary, unproductive, and readily avoidable expenses upon members of the public to participate (the necessary and unavoidable ones may be bad enough in this respect) would be directly opposed to that congressional and, generally, FTC objective.

All that ANA seeks here is judicial direction to the commission that it impose relevancy requirements upon evidence before admitting it into a rulemaking record, a remedy that will not only relieve ANA, and the members of the group it represents, of irreparable injury in this case, but will affirmatively advance -- as would the failure to do so contravene -- the legislative intent in enacting section 57a.

Secondly, the Myers precedent has had no application to this time, except in administrative proceedings where requirements of relevancy have been imposed in the administrative proceeding itself. 11/ Thus, fundamentally, the kind of wrong - hence injury - at bar here, has never received the Myers treatment; and should not.

Finally, the Myers principle has been applied only in cases where - apart from litigation expense - there has been

---

11/ Note, as to FTC proceedings, 16 CFR §3.43(b):

Admissibility - Relevant, material, and reliable evidence shall be admitted.  
Irrelevant...evidence shall be excluded.

an absence of injury that was irreparable unless immediately cured; - i.e., a failure by the plaintiff to demonstrate that it had "no other adequate remedy in a court" (5 U.S.C. §704). Thus, in PepsiCo (supra, page 21) where the plaintiffs attempted to convince this court that unless it intervened they could be subjected to conflicting legal obligations, Judge Friendly (with Judge Medina dissenting) wrote:

The upshot of all this is that the fears of PepsiCo and Pepsi-Cola of Corvallis of determinations in private suits inconsistent with a FTC cease and desist order are groundless...

472 F.2d at 189 12/

In stark contrast to the facts in PepsiCo, it already has been shown at pages 12-20 above that ANA's injury is substantial (its statutory (pages 12-17) and constitutional (pages 27-30) rights have been violated) and substantiated (the facts set forth at pages 2-8 are uncontroverted). The district court's reliance on PepsiCo is inappropriate; ANA has sustained actual injury (not has groundless fears) and has no other adequate remedy, supra, pages 17-20 (not has failed to demonstrate that fact).

3. Basic Principles of Non-Statutory Law,  
Stemming from Leedom v. Kyne and Fay v. Douds Establish the District Court's  
Jurisdiction Over the Within Case.

The United States Supreme Court has held that in appropriate circumstances an injured party need not await final agency action before having judicial review, Leedom v. Kyne, 358 U.S. 184 (1958). ANA's plight comes within the

---

12/ Other decisions in the Myers line of descent will be discussed in the following two sections.



bounds of Leedom's precedent, which established one's rights to immediate judicial review and appropriate remedies upon a showing that unlawful action by an agency has inflicted an injury on it.

This case, in its posture before us, involves "unlawful action of the Board [which] has inflicted an injury on the [respondent]. Does the law, "apart from the review provisions of the "Act", afford a remedy? We think the answer surely must be yes. This suit is not one to "review", in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. \* \* \* It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Id. at 188-89.

If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.... [citation omitted].

Id. at 190.

This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.

Id.

The acts complained of herein come within those which fashioned the Leedom doctrine. ANA is not asking this

court to review or enjoin a finally promulgated trade regulation rule (whether anticipatorily or after the administrative proceeding has concluded; and over which the courts of appeals unquestionably do have exclusive jurisdiction). It is asking for relief from final agency action taken in derogation of statutory command and of the constitution (infra, pages 27-30), during the administrative proceeding to be sure, but for which subsequent review will be too late to provide an adequate remedy. (Supra, pages 17-20). Leedom establishes ANA's right to judicial review that is immediate enough to be timely and effective. Here, as there, protection is being sought "of a 'right' assured by Congress" (supra, pages 12-17) which would otherwise be denied by agency action.

Beyond that, more than a quarter century ago this circuit held that district courts need not await final action before reviewing disputes engendered by the conduct of administrative proceedings where there is an "assertion of constitutional right...not transparently frivolous", Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949). Other circuits have recognized that doctrine, The Coca-Cola Company v. FTC, 475 F.2d 299, 303 (5th Cir. 1973); The Seven-Up Company v. FTC, 478 F.2d 755, 757 (7th Cir. 1973); Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 993, 996 (D.C. Cir. 1963).

In Coca-Cola (supra, page 21) for example, the court, while denying relief, pointed out:



...it is probably a correct statement of the law even in our own circuit that an "assertion of constitutional right . . . not transparently frivolous . . . [gives] the District Court jurisdiction" to hear an attack on an interlocutory agency order, *Fay v. Douds*, 172 F.2d 720 (2nd Cir. 1949) (L. Hand); *Contra*, *Volney Felt Mills, Inc. v. Le Bus*, 196 F.2d 497 (5th Cir. 1952)... \* \* \* \* When, as in the present case, parties bring suit in District Court alleging the deprivation of specific constitutional rights or, indeed, specific statutory rights, *Leedom v. Kyne*, supra, the District Court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting, and if so, whether such rights have been infringed and how they ought to be redressed.

475 F.2d at 303.

The sole basis for the court's holding against the plaintiff was that the requisites of the Leedom and the Fay rules had not been satisfied on the particular facts of the case.

The "right" to be free of a multiplicity of lawsuits is not a statutory right, not a constitutional right and, in the context of the present case, not a right at all but an equitable principle . . .

475 F.2d at 304.

Here, however, there are involved in addition to the statutory rights described at pages 12-17 above, cumulative constraints of two constitutionally protected rights, free speech (the trade regulation rule concerns the advertising of food products) and due process (the rights to meaningful cross-examination and rebuttal during a rulemaking proceed-

ing). The court must treat in this case not merely with procedural due process in the protection of a common law or statutory right, but in the defense of speech against abridgment.

The United States Supreme Court has held commercial advertising to be a protected form of speech, Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Linmark Associates, Inc. v. Willingboro, No. 76-357, U.S. Supreme Court, May 2, 1977. The rulemaking proceeding underlying this action involves precisely that, and affects the first amendment rights of advertisers of food products, and of ANA as the representative of many of them.

The Supreme Court also has held that where agency abridgment of a first amendment right is involved plenary judicial review is indispensable, Blount v. Rizzi, 400 U.S. 410 (1971). Adequate cross-examination is an inseparable component of a plenary judicial process, and no such review can exist alongside a denial of meaningful cross-examination. A fortiori, any contemplated abridgment of speech by FTC (such as is involved in its regulatory proceeding at issue here) that is based upon agency-obstructed cross-examination, is abhorrent to the fifth amendment not merely in the ordinary ways, but with respect to its additional, and even more solemn role as an ancillary guardian of first amendment rights. Thus, the



within action intimately involves an interface of fifth amendment with first amendment rights, so that the transgression of one augments violation of the other. The Fay and Leedom teachings are outstandingly appropriate.

Although Judge Friendly, writing for this Court in Sterling Drug, Inc. v. Weinberger (supra, page 21) declared ". . . we shall continue to regard Myers as, stating the general rule and Leedom v. Kyne as being what the Supreme Court says it is [in Boire v. Greyhound Corp., 376 U.S. 473, 481] -- a narrow exception", the matrix in which the Supreme Court's statement was formed is to be kept in mind. The Boire decision concerned an action by NLRB that "[b]oth parties agree[d] . . . in the normal course of events . . . [is] not directly reviewable in the courts", but can be included in judicial review of a finding by the Board of an unfair labor practice, and, said the court, ". . . it is . . . obvious that Congress explicitly intended to impose precisely such delays" as were involved in that indirect method of obtaining judicial review. 376 U.S. at 476-78.

Thus, there existed in Boire one of those special situations, not present here, where, in the words of Abbott (infra, page 34) a "statute precludes [intermediate judicial] relief". The Boire court further pointed out that the case involved "essentially a factual issue, unlike the question in Kyne, which depended solely upon construction of the statute." Id. at 481.

In any event, three years following Boire, and notwithstanding anything therein, the Supreme Court stated in McKart v. United States, 395 U.S. 185, 193 (1967):

The doctrine [exhaustion of administrative remedy] is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions see e.g., Layton & Pine, The Draft and Exhaustion of Administrative Remedies, 56 Geo. L.J. 315, 322-331 (1967). Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved. <sup>13/</sup>

Thus, in B.F. Goodrich Co. v. FTC, 208 F.2d 829 (D.C. Cir. 1953), appeal after remand 242 F.2d 31 (1957), the court reversed judgments of the district court dismissing, for lack of jurisdiction, actions to enjoin the Commission from enforcing a rule promulgated by it under the Robinson-Patman Act. The court of appeals stated:

Our problems are whether the District Court had jurisdiction and whether the complaints stated a claim upon which relief could be granted. Those problems boil down to whether the complaints allege the sort of damage which will support injunctive relief against an administrative regulatory order.

208 F.2d at 832  
(footnote omitted.)

and

We think the proper disposition of the cases under the circumstances is to remand them all with directions to the

---

<sup>13/</sup> McKart is itself an exception, holding that a Selective Service draftee's "failure to utilize a particular administrative process - an appeal - [does not ban] him from defending a criminal prosecution on grounds which could have been raised on that appeal". (395 U.S. at 197.)



District Court to entertain them as an initial step, and if upon hearing it develops that some of the plaintiffs are not actually threatened with damage by way of disruption of business, those complaints can be dismissed.

208 F.2d at 834.

The selective holdings of the Court of Appeals for the Seventh Circuit in Jewel Companies Inc. v. FTC, 432 F.2d 1155 (1970) also are highly illuminating. It held that the court should not intervene before final agency decision to determine (1) whether the agency complaint was adequate as a matter of law, and (2) whether the discretion of the Commission was properly exercised in issuing its administrative complaint, and (3) whether the Commission's action would be an infringement on the jurisdiction of the Secretary of Agriculture under 7 U.S.C. §§ 499(a) et seq. By contrast however, the court did hold that jurisdiction existed to review immediately an asserted misunderstanding by one of the commissioners (whose vote was determinative to issuance of the Commission's complaint) as to the construction of the Commission's obligation of enforcement under sections 2(c) and 11 of the Clayton Act, 15 U.S.C. §§13(c) and 21. The court stated:

The question raised is inherently a legal one and does not involve any factual determinations ... Since the question is one of statutory construction as to the authority of a Commissioner in voting for the issuance of a complaint for violation of Robinson-Patman and does not involve any substantive determination by the Commission, the Commission's reliance upon Myers v. Bethlehem Shipbuilding, supra, is misplaced.

\* \* \* The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order.

432 F.2d at 1159  
(footnote omitted).

Illustrations of interlocutory judicial intervention despite purportedly exclusive appellate procedures under the National Labor Relations Act are found in Farmer v. United Electrical, Radio Machine Workers of America (UE), 211 F.2d 36 (D.C. Cir. 1953) and Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 903 (D.C. Cir. 1963).

In a 1964 decision, Union Bag-Camp Paper Corporation v. FTC, 233 F. Supp. 660 (S.D.N.Y. 1964), Judge Cooper accepted jurisdiction to determine whether the plaintiff was entitled to have the commission obtain, for plaintiff's benefit, certain special reports pursuant to FTCA §6 (b), 15 U.S.C. § 46(b). <sup>14/</sup>

Judge Cooper stated, "If we are satisfied that the Commission has violated a statutory mandate here, we will not require plaintiff to wait until it is ordered to cease and desist from violating Section 7 of the Clayton Act before obtaining redress". 233 F. Supp at p. 663. He went on to state, "Plaintiff is claiming that the agency action was in direct derogation of the alleged statutory command to supply

---

<sup>14/</sup> The court dismissed the complaint on its merits on the ground that plaintiff had no such statutory right where section 6(b) orders are concerned. Here, of course, ANA is relying upon the constitutional right of due process and statutorily based rights defined in 15 U.S.C. §57a(c), and recognized by the commission itself in 16 CFR §1.13.



it with 6(b) reports. Clearly, the instant action falls within the ambit of both Leedom and Boire as one involving the interpretation and construction of a statute". (At p. 663.)

So, too, does this case; all the more so, however, because of its constitutional overtones as well.

4. Since, As Has Been Shown at Pages 17-20 Above, Deferred Judicial Review Could No Longer Give ANA Adequate Relief From the Injury It Now Faces, It is Entitled to Receive Such Relief in This Case Under 5 U.S.C. § 704.

The guiding principles for judicial reviewability under 5 U.S.C. §704 derive from the Supreme Court's 1967 Abbott Laboratories trilogy. <sup>15/</sup> There the court made it clear that requests for such judicial relief shall be given "hospitable" treatment.

...the Administrative Procedure Act ... embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute", 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. §701(a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court", 5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this

---

<sup>15/</sup> Abbott Laboratories v. Gardner, 387 U.S. 136; Toilet Goods Association v. Gardner, 387 U.S. 158; Gardner v. Toilet Goods Association, 387 U.S. 167.

Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L. Ed. 868; see United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 S. Ct. 1410, 1414-1415, 93 L. Ed. 1451; Brownell v. We Shung, supra; Heikkila v. Barber, supra. Again, in Rusk v. Cort, supra, 369 U.S. at 379-380, 82 S. Ct. at 794, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, Judicial Control of Administrative Action 336-359 (1965).

Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967) (footnote omitted); to same effect, Gardner v. Toilet Goods Association, 387 U.S. 167 (1967). Of., Toilet Goods Association v. Gardner, 387 U.S. 158 (1967).

In Elmo Division of Drive-X Co., Inc. v. Dixon, FTC, 348 F.2d 342 (D.C. Cir. 1965) the court reversed a district court holding that it lacked jurisdiction to stop the commission from proceeding upon an administrative complaint where, according to plaintiffs, the existence of an earlier consent decree required the commission to proceed, instead, by way of reopening the earlier case. Pertinently, the court wrote:

Were this an action between private parties, appellant would be hard pressed to demonstrate absence of an adequate remedy at law and this would ordinarily render specific relief inappropriate. Here, however, the injury which appellant asserts is one for which any adequate legal remedy is very remote. \* \* \* The gist of appellant's complaint is ... that the Commission may not institute any complaint proceeding against



it in relation to matters covered by the consent order until the necessary preliminary findings have been made at a reopening hearing reviewable by a Court of Appeals. Given the nature of the injury claimed, an appellate court reviewing an order resulting from the new complaint proceeding can afford appellant no meaningful remedy.

348 F.2d at 347  
(footnotes omitted). 16/

The questions pivotal here, then, as distilled from The Administrative Procedure Act and the pertinent authorities are:

1. Is ANA "suffering legal wrong" or being "adversely affected or aggrieved by ... action" of the defendants? 5 U.S.C. §702.

2. Is such action "final"? 5 U.S.C. § 704.

3. Does any statute preclude this Court from giving ANA the relief it seeks? Abbott, supra, pages 34-35.

4. Does ANA have other adequate remedy in a court for defendants' said action? 5 U.S.C. §704.

ANA has been wronged and is aggrieved, as a matter of law 17/ and of constitutionality 18/. Similarly, there

---

16/ Here, similarly, a court of appeals reviewing a final TRR under 15 U.S.C. § 57a(e)(1)(A) can afford ANA no meaningful remedy (see pages 17-20, above).

17/ Supra, pages 25-27. "...we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: ..." Abbott Laboratories at 149.

18/ Supra, pages 27-30. "Where...parties bring suit in District Court alleging the deprivation of specific constitutional rights... the District Court has jurisdiction to inquire into the preliminary question of whether judicial vindication of the alleged rights is appropriate in a given procedural setting, and if so, whether such rights have been infringed and how they ought to be redressed." Coca-Cola, supra, page 21, 475 F.2d at 303.

can be no doubt, upon the uncontroverted facts, that (a) the Presiding Officer's rejection of ANA's petition and his refusal to certify it to the full commission was a denial of relief, hence, "agency action" within the definition of 5 U.S.C. §551 (13), 19/ and (b) that it was final (Hafner, ¶10 (113a); Complaint, ¶ THIRTEENTH (11a); and infra, pages 40-41).

Neither 5 U.S.C. §704 nor any other statute "precludes such relief" (Abbott, supra, p. 34) as ANA sought from the district court. In their briefs before the district court the defendants relied upon the sentence in section 704 that reads, "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." This provision does not, however, undertake to declare what preliminary, procedural or intermediate agency actions or rulings are or are not directly reviewable; and it certainly does not mandate that preliminary, procedural or intermediate agency actions or rulings as such shall not be directly reviewed.

As Abbott pointed out, citing Rusk v. Cort, "Only upon a showing of the 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" (supra, page 35). This passage in section 704 is not such clear and convincing evidence.

---

19/ "'agency action' includes the whole or a part of... agency...relief...or denial thereof, or failure to act."



No better evidence of its lack of clarity and convincingness need be searched for than Judge Friendly's unsuccessful effort to probe for its import in PepsiCo (supra, pages 21,25), 472 F.2d at 186-87. Starting with an observation, "The legislative history of the APA sheds little light on what the framers meant by 'final agency action for which there is no other adequate remedy in a court'", he then comments, "A quick reading of the second sentence of §10(c) might suggest that interlocutory rulings were never to be reviewed until there had been final agency action in the usual sense." That, of course, is the commission's contention. It is significant, therefore, that he went on to point out, "However, the phrase '[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable' (emphasis supplied [by the court]) suggests that some action may be directly reviewed, although it does not explain by what authority unless the reference is to special statutory review procedures."

Most pertinently, he appears to reach a conclusion that is opposed to the commission's version of the second sentence of APA §10(c) [5 U.S.C. §704], namely:

Perhaps the second sentence could best be read as designed to insure that, like similar orders in civil actions . . . preliminary orders in administrative proceedings which are not immediately reviewable do not remain beyond review forever.

472 F.2d at 186.

He also includes in his exploration possible interplays of the section with the Myers holding (which has been dealt with for its inapplicability here at pages 23-25 above) and the Leedom doctrine, putting forth a far more restrictive reading of the latter than seems compatible with the authorities discussed at pages 25-34 above.

His "bottom line" however is, "We find no need to proffer a solution to the question of the reviewability of agency orders which are not 'final' in the ordinary sense . . .", a terminus that, if nothing else, bespeaks the wide gap that separates the second sentence in section 704 from the "clear and convincing evidence" Abbott requires of a legislative intent in order to preclude judicial review in this case.

Indeed, ANA's dilemma is remarkably analogous to that in which Abbott Laboratories found itself insofar as inadequacy of deferred judicial review is concerned, supra, pages 17-20. If it goes ahead and does what the commission says it must (in Abbott it was the Food and Drug Administration), it moots its own case and destroys any possibility of benefiting from the remedy which it should enjoy. If it proceeds under the assumption that its position is correct, only to have a court of appeals ultimately disagree with it, it runs the grave risk of having a final rule promulgated that contains provisions which may not have been supportable (or included) had ANA searched them out and subjected them to rebuttal. Damned if it does; damned if it doesn't! Only immediate review can obviate the potentiality of ANA's being irreparably hurt one way or the other.



There is yet another, and special, factor this court might appropriately take into consideration in connection with deciding between immediate or deferred review.

While this has not been brought as a class action, it is unmistakable the rights of more than ANA will be affected by the decision herein, both directly (the members of the group for which ANA has been designated representative, supra, pages 16-17) and indirectly (all other "interested persons" in the TRR for food advertising or, by precedential impact, in others to come).

A definitive judicial determination, even if only by means of a declaratory judgment at the earliest possible moment as to whether "the fullest and most meaningful participation in the rulemaking proceeding by interested members of the public and those most likely to be affected by the rule" (supra, page 5) will be allowed to be frustrated, if not utterly defeated, by permitting a rulemaking record to be made gross with matter to which no standards of relevancy, materiality or any other criterion have been applied, despite the provisions of the governing statute and the commission's own rules, could be nothing other than salutary not only for ANA but for the general public, and even the commission itself.

5. ANA Has Exhausted All Administrative Remedies Available To It; The Commission's Actions Are Ripe For Judicial Review.

If the requirement of exhaustion of administrative remedies is interpreted to mean that one must await the ultimate conclusion of a rulemaking proceeding before obtaining judicial

relief, it is submitted that the irreparable injury ANA has suffered, being deprived, by final agency action, of its rights of cross-examination and rebuttal during a rulemaking proceeding (supra, pages 12-17) and the teachings of the controlling legal precedents, statutory (supra, pages 34-40) as well as non-statutory, (supra, pages 25-34) call for a different result and justify, if not require, immediate judicial review.

If, alternatively, the exhaustion doctrine is intended to mean that one must pursue its administrative remedies completely at every stage of the litigation, it is clear that ANA has satisfied that requirement (supra, pages 5-8). ANA has availed itself of every conceivable opportunity before the Presiding Officer (who refused to certify ANA's petition to the commission) in attempts to assure itself of meaningful participation in the rulemaking proceeding via meaningful cross-examination and presentation of rebuttal submissions. It cannot seriously be contended that all administrative remedies have not been exhausted [Complaint, ¶¶ Eighth, Tenth, Eleventh, Twelfth, Thirteenth (8a, 9a-11a); Hafner, ¶¶ 13, 17, 18 (114a, 115a-116a); Items 4, 4a, 6, 7, 8, 9 (69a-74a, 79a-109a)].

Every point referred to above was advanced in even greater elaboration and detail to the commission via its designated exclusive delegate, the Presiding Officer (16 CFR §1.13 (c)(1). See Hafner, ¶¶ 13, 17, 18; 114a, 115a-116a.



### SUMMARY

The district court's decision is wholly reliant upon Coca-Cola and PepsiCo (3a).

But those decisions are not apposite here because:

The plaintiffs therein failed, as in the Myers line of cases, 20/ to prove the essential element of injury from deferred judicial review other than the expense of completing the underlying administrative proceeding (supra, pages 24-25, 27-28). 21/

Thus, they failed to show lack of "other adequate relief in a court" (supra, pages 24-25, 27-28);

Also, their claims of agency wrongdoing were not based upon violation of statute or constitution; hence determination of their claims involved resolution not of questions of law or constitutionality but of issues of fact (supra, pages 24-25, 27-28).

In this case, by contrast, ANA shows:

Injury other than mere expense of continuing to defend against the unfinished portions of the TRR proceeding (supra, pages 9-17);

Such injury is not adequately reparable if judicial review of the final agency action com-

---

20/ Including PepsiCo, Coca-Cola, Sterling Drug, (supra, page 21).

21/ Additionally, the Myers principle is inappropriate to TRR proceedings, as distinct from adjudicatory ones (supra, pages 23-25).

plained of herein is deferred (supra, pages 17-20);

ANA's claim of agency wrongdoing is based, not frivolously, upon violation of statutory and constitutional requirements, turning upon questions of law, not issues of fact (supra, pages 2-8, 25-40).

Therefore, the doctrines of Leedom, Fay, and Abbott rather than of Coca-Cola, PepsiCo and Myers are applicable and must control upon the facts of this case (supra, pages 2-8, 25-40).

#### Conclusion

The judgment of the district court should be reversed.

Dated: New York, New York  
May 11, 1977

Respectfully submitted,

WEIL, GUTTMAN & DAVIS

By Gilbert H. Weil *gg*  
Gilbert H. Weil

Attorneys for Plaintiff-Appellant  
60 East 42nd Street  
New York, New York 10017  
(212) 687-8573

Of Counsel  
Gilbert H. Weil  
Robert L. Sherman



Service of three ② copies of the within  
is admitted this 12<sup>th</sup> day of MAY 1977

---

ATTORNEY DEFENDANTS  
Appellees

*Robert B. Fiske, Jr. (KZ)*  
COPY RECEIVED  
5/12/77  
UNITED STATES ATTORNEY

